IN THE

Supreme Court of the United States

October Term, 1972.

No. 72 - 1058

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, McKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the MONROE COUNTY BOARD OF ELECTIONS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

RUTH B. ROSENBERG,
DAVID N. KUNKEL,
New York Civil Liberties Union,
c/o One Exchange Street,
Rochester, N. Y. 14614,
WILLIAM D. EGGERS,
League of Women Voters,
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Attorneys for Appellants.

BURT NEUBORNE,
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AUTHORITIES.

IN THE

Supreme Court of the United States

October Term, 1972.

No.

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, MCKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the Monroe County Board of Elections,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdictional Statement.

This is an appeal from the judgment of the New York Court of Appeals sustaining the validity of New York Election Law §§ 117-a and 153-a, which provide for absentee registration and balloting by persons unable to appear personally because they are confined as a result of an illness but fail to provide similar procedures for eligible voters confined in jail awaiting trial or serving misdemeanor sentences, over appellants' contention that the statutes as construed and applied are repugnant to the equal protection clause of the United States Constitution. Appellants submit this statement to establish the jurisdiction of this Court and the substantiality of the federal question presented.

Opinions Below.

The opinion of the New York Court of Appeals is reported at 31 N. Y. 2d 317 (1972). The opinions of the Appellate Division of the Supreme Court, Fourth Judicial Department, and the Supreme Court are not yet reported. All three opinions are set forth as Appendices C (*infra*, at pp. 24-28), B (*infra*, at pp. 22-23), and A (*infra*, at pp. 18-21), respectively.

Jurisdiction.

This suit was commenced on October 11, 1972, in New York Supreme Court, Monroe County, as a "special proceeding" under Article 78 of the New York Civil Practice Law and Rules and §331 of the New York Election Law. Appellants, eligible voters confined to the Monroe County jail, sought declaratory relief and relief

in the nature of mandamus enabling them to register and vote in the November 1972 General Election. They sought: (1) procedures enabling them to register and vote in person either at the jail or at established polling places; (2) a construction of §§ 153-a and 117-a of the New York Election Law to permit appellants to cast ballots by absentee procedures; and (3) a declaration that §§ 153-a and 117-a of the New York Election Law, if construed not to apply to appellants, deny appellants the equal protection of the law under both the New York State and the United States Constitution. Appellees conceded the material allegations in the petition and the New York courts have reached the merits of the controversy.

On November 3, 1972, the New York Court of Appeals reversed an order of the New York Supreme Court, Appellate Division, Fourth Department, entered October 27, 1972, which had modified the judgment of the New York State Supreme Court, Monroe County, entered October 24, 1972. The Court of Appeals dismissed the petition on the grounds that: (1) Election Law §§ 153-a and 117-a permit absentee registration and balloting by persons unable to appear personally, confined in a hospital or institution, and medically incapacitated, but those provisions do not extend similar rights to persons unable to appear personally and confined to jail as pretrial detainees or misdemeanants; (2) registration and voting in the jail and guarded transportation to voting facilities involved unacceptable difficulties and hazards; and (3) the statutes construed not to provide absentee registration and balloting to appellants, but extending absentee registration and balloting to other persons confined and unable to personally appear, do not violate the equal protection guarantees of the New York or United States Constitutions. The decision and order of the Court of Appeals are appended hereto as Appendix D (*infra*, pp. 29-31).

Appellants' application for a stay of the judgment of the New York Court of Appeals was denied by Mr. Justice Marshall on November 6, 1972 (Appendix E, *infra*, pp. 32-34). On November 9, 1972, a notice of appeal to this court was filed in the New York Court of Appeals (Appendix F, *infra*, at pp. 35-36). The jurisdiction of this court to review, on direct appeal, a judgment of the highest court of New York sustaining the validity of New York Election Law §§ 153-a and 117-a over appellants' contention that the statutory provisions, as construed and applied, are repugnant to the Constitution of the United States is conferred by 28 U. S. C. §1257(2). *Dahnke—Walker Mill Co. v. Bondurant*, 257 U. S. 282 (1921).

The Statutes Involved.

The statutes involved in this appeal are New York Election Law §§ 153-a and 117-a. Both statutes are set forth in their entirety in the Appendices. Section 153-a is set forth in Appendix G, *infra*, pages 37-44; §117-a is set forth in Appendix H, *infra*, pages 45-47.

Questions Presented.

1. Whether New York's Election Law §153-a is unconstitutional in that it permits qualified voters who are unable to appear personally for registration because they are confined at home or in a hospital or institution because of illness or physical disability or outside the county of residence because of their duties, occupation or business, to register by absentee registration, but fails to permit absentee registration for qualified voters physically disabled by reason of their being detained in a county jail awaiting trial, who, having been denied administrative relief allowing them to ap-

pear personally for registration, are absolutely denied the exercise of their franchise because of their incarceration.

2. Whether New York Election Law §153-a is unconstitutional in that it permits absentee registration by qualified voters described above but fails to permit absentee registration by qualified voters physically disabled by reason of their being detained in a county jail serving sentences as misdemeanants, who, having been denied administrative relief allowing them to appear personally for registration are absolutely denied the exercise of their franchise because of their incarceration.

3. Whether New York Election Law §117-a is unconstitutional in that it permits absentee balloting by qualified voters who are unable to appear personally at the appropriate polling places because of illness or physical disability (where Election Law §117 permits absentee balloting by qualified voters unable to appear personally on the day of election because of absence from the county of residence on account of vacation, duties, occupation or business requirements elsewhere, or unavoidable absence from residence because of being an inmate at a veterans' bureau hospital), but denies absentee balloting to qualified voters who are unable to appear personally at the appropriate polling places because they are physically detained in a county jail awaiting trial, when they have been denied administrative relief permitting them to appear personally to vote.

4. Whether New York's Election Law §117-a is unconstitutional in that it permits absentee balloting by qualified voters unable to appear personally at the appropriate polling place because of reasons described above, but

denies absentee balloting to qualified voters who are unable to appear personally at the appropriate polling places because they are physically detained in a county jail serving sentences as misdemeanants, when they have been denied administrative relief permitting them to appear personally to vote.

Statement.

The uncontroverted facts are that on October 10, 1972, appellants, comprising 72 eligible voters residing in Monroe County, New York, were incarcerated in Monroe County jail either (1) as pretrial detainees unable to post bail, or (2) as misdemeanants serving sentences. Five of the named appellants were registered to vote. The remainder were not registered. All sought means to cast ballots in the 1972 General Election. From August, 1972, to October 11, 1972, appellants, by their representatives, requested that local election and jail officials provide a mechanism by which appellants could register and cast ballots. Appellants sought mobile registration in the Monroe County Jail, guarded transportation to places of local or central registration, and other means for registration and voting in person, or the appropriate forms for registration and balloting under absentee procedures. Their requests were denied. The Appellate Division has found as a fact that such requests were properly and timely made, and that finding has not been disturbed by the Court of Appeals.

In this proceeding, appellants sought an order directing the Sheriff to permit appellants to be transported to places of registration and voting, directing the Commissioners of Election to permit appellants to register and vote at the jail, directing that appellees, Commissioners of Election, permit appellants to register and

vote by absentee ballot, or directing any other means of relief that would protect the voting rights of appellants, and in the alternative appellants challenged the statutory classification that had the effect of denying them their right to vote while extending the right to vote by absentee procedures to all other persons physically incapacitated who are otherwise eligible voters. The alternative methods of registration and voting sought by appellants have been "reject[ed] out of hand" by the New York Court of Appeals, and that court has construed the absentee provisions of the New York Election Law to deny absentee ballots to appellants. It may not be controverted at this stage of the proceedings that as a result of the Court of Appeals decision appellants and other persons hereafter similarly situated are left without any means of registering and casting ballots.

The federal questions presented in this appeal were raised by appellants at every stage of the state proceedings. Appellants relied on the federal equal protection clause in their petition, show cause order, supporting affidavit, the memorandum of law addressed to the New York State Supreme Court, the brief submitted to the Appellate Division, the brief submitted to the Court of Appeals and all oral arguments. The New York State Supreme Court and the Appellate Division decided in appellants' favor on state grounds and did not reach the federal question. The Court of Appeals, over two strong dissenting opinions, ruled against each of appellants' state law contentions and sustained the validity of New York Election Law §§ 117-a and 153-a over appellants' contention that those provisions, as construed and applied to deny absentee registration and balloting to appellants, were repugnant to the United States Constitution.

The Questions Are Substantial.

1. The New York Court of Appeals departed from the standard of review applied by this court to test classifications affecting the exercise of the franchise.

This Court has uniformly subjected laws limiting the exercise of the right to vote to the most careful judicial scrutiny, under which the burden is upon the State to meet the "strict equal protection test . . . that such laws are *necessary* to promote a *compelling* governmental interest." *Dunn v. Blumstein*, 405 U. S. 330, 336 (1972).

In *Reynolds v. Sims*, 377 U. S. 533, 561-562 (1964), the Court articulated the reasons for the strict standard of review:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

In *Dunn v. Blumstein*, *supra*, at 336, the Court summarized the law:

> By denying some citizens the right to vote, such laws deprive them of "a fundamental political right . . . preservation of all rights." *Reynolds v. Sims*, 377 U. S. 533, 562 (1964). There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes which selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis

> with other citizens in the jurisdiction. [Citations omitted.] This "equal right to vote," *Evans v. Cornman, supra*, at 426, is not absolute; the States have the power to impose voter qualifications and to regulate access to the franchise in other ways. [Citations omitted] But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." [Citations omitted.]

The New York Court of Appeals has failed to follow the controlling equal protection doctrines of this Court. Although that Court "reject[ed] out of hand" all avenues of voting proposed by appellants, it applied the standard of review under which "[the absentee provisions] need only be reasonable in light of the scheme's purposes . . ." Appendix C, *infra*, page 26. As a consequence of that Court's dismissal of appellants' request for other relief appellants are absolutely precluded from voting unless they can cast ballots by absentee methods. Appellants can not state their position with more precision than did Mr. Justice Marshall in denying appellants' application for a stay (Appendix E, *infra*, p. 33):

> . . . [i]t seems clear that the State has rejected alternative means by which appellants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e.g.*, *Harper v. Virginia Board of Elections*, 383 U. S. 667, 670 (1964).

The New York Court of Appeals was mistaken in holding that *McDonald v. Board of Elections*, 394 U. S. 802 (1969), is controlling. That case recognizes that *incidental* burdens on the exercise of voting rights are

not subject to a stringent standard of review and applies the standard of judicial deference because the pretrial detainees in *McDonald* failed to establish that the denial of absentee procedures was more than an incidental burden on their right to vote. *Bullock v. Carter*, 405 U. S. 134, 143 (1972). The crucial factual distinction between *McDonald* and this case is that in *McDonald* the Court found "nothing in the record to [show] . . . that Illinois has in fact precluded appellants from voting." 394 U. S. at 808 and see n. 6 and 7 at 808-809.

That distinction was recognized by this Court in *Goosby v. Osser*, U. S. (#71-6316, 1-17-73). In *Goosby* pretrial detainees attacked the Pennsylvania statute under which they were denied absentee ballots and alleged that their requests for procedures under which they could vote in person had been denied. The Court held that petitioners were entitled to present their contentions to a three judge Court. The Court wrote,

> Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast [to *McDonald*]. Petitioners alleged that, unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot [citation omitted] and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied. Thus, petitioners' complaint alleges a situation which *McDonald* itself suggested might make a different case.

With the construction placed on the New York statute by the decision of the Court of Appeals, and with that Court's dismissal of appellants' other proposed relief, the instant case is distinguishable from *McDonald* for the reasons stated in *Goosby*.

The classification in the instant case affects "the politically disconnected and the financially disabled." (Dissenting opinion of Burke, J.; Appendix C, *infra*, at p. 28.) New York denies the franchise to persons detained in jail awaiting trial because they are unable to afford bail, while it leaves intact the right to vote of persons who are able to post bail. That result conditions the full exercise of the franchise upon wealth, just as surely as the poll tax, which was struck down by this Court in *Harper v. Virginia Board of Elections*, 383 U. S. 663, (1964), where it was emphatically stated that "voter qualifications have no relation to wealth . . ." 383 U. S. at 666.

The classification here is invidious because it favors persons unable to appear personally for balloting on the acceptable, normal grounds of medical disability, while it attaches a further, unnecessary punishment to persons who are accused or who are serving sentences for minor crimes. In the face of an invidious classification, deference to future legislative determination is inappropriate.

Because this state statutory scheme restricts the right to vote as a result of an invidious classification, the strict standard of review applies and the decision of the Court of Appeals is plainly incorrect.

2. The statutory classification denying absentee ballots to appellants is not supported by any compelling state interest.

The New York statutory provisions governing registration and balloting by absentee means distinguish between voters on grounds that fail to withstand judicial scrutiny. As applied to persons who are otherwise literally unable to vote, such provisions are the procedures by which the right to vote is finally granted or denied. Under the New York statutes persons unable to appear personally for registration and voting because they are confined in an institution as a result of a medical disability may vote. If the confinement is judicially imposed for a pretrial detainee or a misdemeanant the right to vote is denied, unless, by mere circumstance, such person is confined out of the county of his residence. The distinctions embodied in that statutory network, with the resulting denial of the right to vote to persons in the positions of appellants, are impermissible.

It is significant that the New York Court of Appeals merely relied on *McDonald v. Board of Elections, supra,* for the proposition that statutory provisions denying absentee ballots to prisoners are reasonable in light of the scheme's purpose. The Court of Appeals made no independent finding of any legitimate state interest that might sustain the denial. As previously noted, however, this Court in *McDonald* was not applying the standard of review required in this instance. This Court there sustained the denial of absentee ballots to persons judicially incapacitated because *on that record* it appeared to be merely more difficult for such persons to vote while persons medically disabled were absolutely unable to appear. That supporting reason has no application on this record. The classification between persons incarcerated within and

those incarcerated without their resident counties was supported in *McDonald* by the argument that that Legislature might have found that "local officials might be too tempted to try to influence the local vote of in-county inmates." (*McDonald*, 394 U. S. at 810). Because that problem may be cured by a number of procedures directed to the conduct of local officials it may not be supposed that the denial of absentee ballots to inmates is "necessary" to serve that goal.

The cornerstone of our jurisprudence is that persons awaiting trial, whether detained in jail or released on bail, are accorded the presumption of innocence. Deprivations flowing from pretrial detention, with its limited function of guaranteeing the appearance of an accused at trial, must be subjected to close scrutiny. Whether the denial of the ballot could be attached as a consequence of committing a misdemeanor is immaterial in this case, because New York has considered this question and has denied the franchise only to convicted felons (New York Election Law §152). As long as pretrial detainees and misdemeanants are permitted to receive and transmit mail, they may exercise their franchise by absentee means with no more burden on jail administrators than that involved in routine correspondence with attorneys and family. It is plain, therefore, that the fact of incarceration does not require the denial of absentee representation and balloting.

Whatever additional burdens are raised for the Commissioners of Election are minor administrative inconveniences not approaching the level of a compelling state interest. The exercise of the ballot by absentee methods involves the same risks, the same administrative procedures, and the same burdens when that right is extended to persons confined in hospitals or institutions for medi-

cal reasons as when that right is extended to persons confined in jails.

It is frivolous to suggest that any administrative inconvenience will arise since many persons in jail are already granted the right to cast ballots by absentee methods. Persons detained in jail out of the county of their residence are "absent from their election districts" and entitled to vote by absentee ballot for President and Vice President under §202 (d) of the Voting Rights Act of 1965 as amended by the Voting Rights Act Amendment of 1970 (42 U. S. C. 1933 aa-1 [d]). Absentee procedures for persons unavoidably absent from their county of residence are provided by N. Y. Election Law §§ 153-a and 117. The procedures jail personnel and election officials follow in administering absentee balloting provisions with respect to persons incarcerated out of their county of residence could apply to appellants without material change. Even if a substantial state interest were at stake,

> . . . the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.

Dunn v. Blumstein, supra, 31 L. Ed. at page 285.

It is respectfully submitted that the decision of the New York Court of Appeals so clearly departs from controlling precedent that the judgment appealed from should be summarily reversed on the merits without further argument. See, *United States v. Haley*, 358 U. S. 644 (1959); *Chamberlin v. Dade County Board*, 377 U. S. 402 (1964). At no stage of these proceedings have

appellees advanced a legislative purpose served by the denial of absentee ballots to appellants that could merit the label of a "compelling state of interest." Accordingly, the appeal is controlled by *Dunn v. Blumstein*, 405 U. S. 330 (1972).

3. The federal questions in this appeal are important.

This appeal raises questions of Constitutional law foreshadowed by *McDonald v. Board of Elections, supra*, and *Goosby v. Osser*, U. S. (#71-6316, 1-17-73), reversing 452 F. 2d 39 (3d Cir. 1970). The *McDonald* decision plainly does not reach the questions now raised. 394 U. S. 802, 808-809, n. 6 and 7. As the Court noted in *Goosby*, appellants' complaint "alleges a situation which *McDonald* itself suggested might make a different case." The instant case reaches this Court after all subsidiary questions have been resolved, all alternative relief denied, and the Constitutional issues framed by the decision of the New York Court of Appeals. The instant appeal, from a final judgment on the merits, presents the *Goosby* question upon a proper record for decision by this Court.

These important Constitutional questions are framed with the specificity and concrete adversity necessary for this Court's consideration. Appellants and appellees have specific continuing interests in the controversy. The wrongful deprivation of the right to register prior to the 1972 General Election, for example, entails a deprivation of the right to enroll in a political party and to participate in the June, 1973, primary election. N. Y. Election Law §§ 186, 191; *Rosario v. Rockefeller* (No. 71-1371). Furthermore, persons incarcerated in 1973 and thereafter as misdemeanants or pretrial detainees will be similarly situated to persons represented by the named ap-

pellants, and will be adversely affected by the judgment appealed from. Under N. Y. Election Law § 117-a (subd. 2) a registered voter may apply for an absentee ballot "not earlier than the 30th and not later than the 7th day before [the] election." Under N. Y. Election Law §153-a (subd. 4), a qualified person may file an application for absentee registration "not earlier than the close of the period of central registration and not later than the last day of local registration before the next following election . . ." N. Y. Election Law §154 (subd. 1) provides that the period of central registration extends through September 18. The short period between the time a qualified voter would first obtain standing and the time necessary to exhaust the administrative and judicial processes will continue to preclude final review by the Supreme Court prior to any General Election. Thus, the Constitutional deprivation resulting from the New York absentee provisions presents a problem "capable of repetition yet evading review." *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969). This appeal will continue to present a justiciable controversy even if the named appellants are not detained or serving sentences at the time the appeal is argued. *McDonald v. Board of Elections*, 394 U. S. 802, 803 n. 1 (1969); *Goldberg v. Kelly*, 397 U. S. 254, 256 n. 2 (1970).

Conclusion.

Appellants submit that the decision of the New York Court of Appeals upholding the validity of the New York State absentee balloting provisions over appellants' contention that the statutes are repugnant to the United States Constitution fails to apply the standard of judicial review mandated by this Court. Under the appropriate standard the statutory classification cannot

withstand judicial scrutiny. The questions presented by this appeal are substantial and of public importance, and, indeed, the argument for reversal is so compelling that appellants respectfully request a summary reversal of the judgment appealed from.

Respectfully submitted,

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APPENDIX A.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF MONROE.

EDWARD F. O'BRIEN, *et al.*,

Petitioners,

against

ALBERT SKINNER, Sheriff of Monroe County and KENNETH POWER and ROBERT NORTHRUP, being the Monroe County Board of Elections,

Respondents.

Article 78 Proceeding under the Election Law.

Judgment directed dismissing the proceeding on the merits.

Appearances:

Ruth B. Rosenberg, William D. Eggers and David N. Kunkel, of Rochester (William D. Eggers, of counsel), attorneys for petitioners.

William J. Stevens, Monroe County Attorney (Michael K. Consedine, of counsel), attorney for respondents.

MEMORANDUM

This is a special proceeding in the nature of mandamus brought on by an order to show cause returnable October 17, 1972 in an Article 78 Proceeding based upon Article 14 of the Election Law. Petitioners, some 72 in number, are all presently inmates of the Monroe County Jail at Rochester, New York, by reason of pend-

ing criminal charges or misdemeanor convictions. They claim to be qualified to register and vote in unspecified election districts of Monroe County but are unable to do so because of their incarceration. Upon the instigation of the League of Women Voters and the American Civil Liberties Union, petitioners have presented their petition, sworn to on October 11, 1972, on behalf of themselves and others similarly situated, whereby they seek an order directing the respondents Sheriff, of Monroe County and the Monroe County Board of Elections to make the necessary arrangements and take the appropriate steps to enable petitioners to register and vote at the forthcoming general election on November 7, 1972.

The suggestion of petitioners that the respondent Sheriff should transport them to their respective polling places for registration and voting in person is too ridiculous to discuss, except to mention this absurd contention in passing, which brings us to the alternative method of registering and voting as an absentee.

The contention of petitioners that they are being unconstitutionally deprived of their rights of franchise cannot be sustained. The Legislature has made adequate provision for absentee registration and absentee voting. Election Law, §153-a sets forth the circumstances under which absentee registration is authorized and the required procedure. It permits such registration of any voter who is ". . . unable to appear personally for registration because he is confined in . . . [an] . . . institution, other than a mental institution because of . . . physical disability . . . ." Since Election Law, §330 requires such provisions to be construed liberally, and because an inmate of a jail is under physical disability to present himself at a polling place or at the central registration office, this court concludes that petitioners are entitled to absentee registration upon complying with the requirements of Election Law, §153-a, provided that

they are not disenfranchised by the provisions of Election Law, §152 and provided that they make due and timely application for such registration.

However, there is no showing that any of these petitioners has made due application. Section 153-a is explicit as to the detailed information to be submitted to the Board of Elections to enable it to make an intelligent decision to determine eligibility for registration. The 72 forms signed by these petitioners and attached to the petition give practically none of such required information. The forms upon which proper applications could have been made to the Board of Elections were available to petitioners, they had ample time to complete and file them, but none of them availed himself of the opportunity. The Secretary of State set October 10, 1972 as the last day for absentee registration (Election Law, §354). The time has now passed within which proper applications could have been made and this court cannot re-write the Election Law.

As to those of petitioners who may be qualified to vote at the forthcoming election because they are already registered, Election Law, §117-a controls. For reasons already stated, the court concludes that such persons are eligible to vote by absentee ballot, except as to such as may have been disenfranchised and provided that each makes due and timely application for an absentee ballot. The forms for such applications, which also require detailed information necessary to enable the Board of Elections to make an intelligent decision as to the eligibility of the applicant to vote are available to petitioners. It does not appear that any of them has made the type of application required. As in the case of their applications for absentee registration, the forms which petitioners have signed and filed with the Board of Elections furnish practically none of the required information.

However, it is not too late for such of these petitioners as may already be registered to make due and timely application for absentee ballots, October 31, 1972 being the last day for the filing of applications for absentee ballots. There is no showing that any of the respondents has obstructed proper application. Should such a situation occur, the courts are open to such petitioners as may feel aggrieved.

Accordingly, judgment is directed dismissing this proceeding on the merits, without prejudice to such of the petitioners as may be qualified to do so, making due and timely applications for absentee ballots, if so advised.

Submit order.

Dated: October 20, 1972

s/ ARTHUR ERVIN BLAUVELT
Justice Supreme Court

APPENDIX B.

718

SUPREME COURT OF THE STATE OF NEW YORK.

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT.

Present:

DelVecchio, J.P., Marsh, Moule, Henry, JJ.

EDWARD F. O'BRIEN, *et al.*,

Appellants-Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County and KENNETH POWER and ROBERT NORTHRUP, being the Monroe County Board of Elections,

Respondents-Appellants.

The above named Edward F. O'Brien, *et al.*, petitioners in this proceeding, having appealed to this Court from a judgment (denominated order) of the Supreme Court, entered in the office of the Clerk of the County of Monroe, on the 24th day of October, 1972, and Albert Skinner, Sheriff, and Kenneth Power and Robert Northrup, being the Monroe County Board of Elections, respondents, having appealed from said judgment, and said appeals having been argued by Mr. David N. Kunkel, of counsel for the appellants-respondents, and by Mr. Michael K. Consedine, of counsel for the respondents-appellants, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously modified by directing respondents Commissioners of Elections to register such of petitioners as shall be found to be qualified and to issue absentee ballots to them, and as so modified the judgment is hereby affirmed, without costs. Memorandum: Petitioners, who are persons incarcerated in the Monroe County Jail awaiting trial because of their inability to make bail or serving sentences on convictions for misdemeanors, indicated their eligibility to register and vote and their desire to do so and filed their applications with the Commissioners of Elections on October 10, 1972 which was the last day for registration.

The Comimssioners of Elections refused to register them. Section 117-a of the Election Law provides for absentee voting where a qualified voter may be unable to appear because of a physical disability. We believe that petitioners, being so confined, are physically disabled from voting and should be permitted to do so by casting absentee ballots.

Enter.

LESTER A. FANNING

Entered: October 27, 1972
LESTER A. FANNING, Clerk.

APPENDIX C.

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

4. No. 501. 72

IN THE MATTER

of

EDWARD F. O'BRIEN, *et al.*,

Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County & ors., being the Monroe County Board of Elections,

Appellants.

SCILEPPI, J.:

Petitioners, seventy-two detainees at the Monroe County Jail awaiting trial on various charges or serving sentences on misdemeanor convictions, by this proceeding seek review of the County Board of Elections' refusal to allow them to register as absentee voters upon the ground that they were not "physically disabled" within the meaning of the applicable provisions of the Election Law; or, in the alternative, to compel the parties respondent to cooperate in undertaking all arrangements otherwise necessary to enable them to vote on November 7th: including, the provision of special polling booths

or other voting facilities and, if necessary, guarded transportation to local polling places.

Special Term granted relief to those petitioners who had personally registered prior to their incarceration and directed that they be allowed to vote by absentee ballot; but, denied similar relief to others who had not so registered, dismissing the petition as to them. On cross appeals, the Appellate Division modified, holding that because of their confinement petitioners were "physically disabled"; hence, at least insofar as they were determined otherwise qualified to vote entitled to cast absentee ballots. Respondents, the County Sheriff and the Board of Elections, prosecute a further appeal to this Court.

We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions and, in view of the attendant difficulties; or, would threaten like hazards embraced by such schema. The question raised, then, resolves itself into simply this: whether confinement to a penal institution constitutes a "physical disability" under Election Law, §§ 117-a and 153-a, thus affording petitioners the occasion to vote by absentee ballot; if not, whether the recognized failure to make such provision deprives them of equal protection of law.

Petitioners seek absentee registration and ballots under Election Law, §§ 117-a and 153-a, providing for absentee voting and registration where a voter is ". . . unable to appear personally . . . [for either purpose] . . . because he is confined at home or in a hospital or institution, other than a mental institution, because of illness or physical disability . . . (Election Law, §§ 117-a [1] & 153-a [1]). Under these provisions, however, a person seeking to qualify by reason of such a disability is further required to submit proof of this fact in the form

of a medical certificate executed by an attending physician or the administrative head of a hospital or institution (Election Law, §117-a [5]; See also Election Law, §153-a). What is required of an applicant, therefore, is that he be medically disabled by reason of some malady or other physical impairment. Under the circumstances, the fact of confinement to a penal institution would not entitled [*sic*] a voter or registrant to avail himself of the absentee provisions.

Nor does the failure to provide these absentee rights deprive the petitioners of their equal protection guarantees. These provisions set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote (cf. *Atkin v. Onondaga Co. Bd. of Elections*, 31 N. Y. 2d 401; *Dunn v. Blumstein*, 405 U. S. 330; see also *Kramer v. Union School Dist.*, 395 U. S. 621, 626-627). Such conditions must, of course, be "necessary to promote a compelling state interest" (*Dunn v. Blumstein*, 405 U. S. 330, *supra; Bullock v. Carter*, 405 U. S. 134, 143; *Atkin v. Onondaga Co. Bd. of Elections*, 30 N. Y. 2d 401, 404-405, *supra; Palla v. Suffolk Co. Bd. of Elections*, 30 N. Y. 2d 36, 49-50).

The underlying right which is the subject of these proceedings is not the right to vote, that right is independently guaranteed, but merely a claimed right to absentee ballots, and in some instances, absentee registration. (*McDonald v. Board of Election*, 394 U. S. 802, 807; *Goosby v. Osser*, 452 F. 2d 39, 40 [3rd Cir., 1971]). And, since these provisions have no direct impact on petitioners' right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. (*McDonald v. Board of Election*, 394 U. S. 802, 809; *Goosby v. Osser*, 452 F. 2d 39, *supra*.) Measured in terms of this less stringent standard, at least one Federal court, on identical facts, has sustained a similar

scheme under Pennsylvania law (*Goosby v. Osser*, 452 F. 2d 39, *supra*).

In the end, petitioners' plaint is directed towards the consequences of their incarceration. In this regard, however, it is significant that they are not alone. Others, including poll watchers assigned outside their voting district, and those confined to mental institutions, to name just two groups who, absent an absentee ballot, would find it well-neigh impossible to vote, are similarly disadvantaged. Perhaps, the statutory scheme should be extended further to include all those so situated. The question has been posed before by a higher source (see *McDonald v. Board of Election*, 394 U. S. 802, 809-810, *supra*); its resolution, nonetheless, is one for the legislature not the courts.

The right to vote does not protect or insure against those circumstances which render voting impracticable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design.

Accordingly, the order appealed from should be reversed and the petition dismissed.

Fuld, Ch. J. (dissenting):

In my view the State Constitution (art. II, §§ 1, 4, 5) guarantees petitioners—some of whom are now incarcerated in the Monroe County Jail awaiting trial while others are serving sentences on convictions for misdemeanors—the right to vote. Accordingly, I would read section 117-a of the Election Law as the Appellate Division has and affirm its order.

BURKE, J. (dissenting):

I concur in Chief Judge Fuld's dissent, and would add merely that, in my opinion, any construction of the Election Law effectively precluding these petitioners from exercising their rights to register and vote is also in violation of the equal protection guarantees of the United States Constitution. As a result of recent media revelations, it is now commonly understood that those confined to our prisons awaiting trial are, for the most part, the politically disconnected and the financially disabled. Individuals more fortunately situated can secure their release either on bail or on their own recognizance. To deny them the right to vote, based upon the condition of incarceration, is to discriminate invideously among those within the same class.

* * *

Order reversed, without costs, and the petition dismissed. Opinion by Scileppi, J. All concur except Fuld, Ch. J., and Burke, J., who dissent and vote to affirm in separate memoranda.

APPENDIX D.

No. 501

COURT OF APPEALS.

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of October in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.
Gearon Kimball, Deputy Clerk.
Remittitur November 3, 1972.

4. No. 501. 72

IN THE MATTER

of

EDWARD F. O'BRIEN, *et al.*,

Respondents,

vs.

ALBERT SKINNER, Sheriff of Monroe County & ors., being the Monroe County Board of Elections,

Appellants.

BE IT REMEMBERED, That on the 30th day of October in the year of our Lord one thousand nine hundred and seventy-two, Albert Skinner, Sheriff of Monroe County, &ors., being the Monroe County Board of Elections, the appellants in this cause, came here unto the Court of Appeals, by William J. Stevens, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Edward F. O'Brien, *et al.*, the respondents in said cause, afterwards appeared in said Court of Appeals by William D. Eggers, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Michael K. Consedine, of counsel for the appellants, and by Mr. William D. Eggers, of counsel for the respondents and Mr. William J. Kogan, for the Attorney General as *amicus curiae* and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the petition dismissed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

GEARON KIMBALL
Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 3, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

GEARON KIMBALL
Deputy Clerk.

(Seal.)

APPENDIX E.

SUPREME COURT OF THE UNITED STATES.

No. A-484

Application for Stay.

EDWARD F. O'BRIEN, *et al.*

v.

ALBERT SKINNER, Sheriff, Monroe County, New York, *et al.*

[November 6, 1972]

MR. JUSTICE MARSHALL, Circuit Justice.

Appellants, 72 prisoners in County Jail in Monroe County, New York, applied to me in my capacity as a Circuit Justice for a stay of a New York Court of Appeals judgment entered November 3, 1972.

The appellants are either convicted misdemeanants or persons who have been convicted of no crime but are awaiting trial. New York law makes no provision for the disfranchisement of these groups. Nonetheless, appellants allege that they have been prevented from registering to vote because correctional and election officials have refused to provide them with absentee ballots, refused to establish mobile voting and registration equipment at the prison, and refused to transport them to the polls. Appellants argue that this restriction on their right of franchise is not supported by the sort of "compelling state interest" which this Court has in the past

required. See, *e. g., Dunn v. Blumstein,* 405 U. S. 330 (1972). They challenge the constitutionality of the New York statute which permits absentee voting by persons confined to state institutions by reason of physical disability but makes no provision for absentee voting by persons confined to state prisons after misdemeanor convictions or while awaiting trial.

In response, the State relies on this Court's decision in *McDonald v. Board of Election Commissioners,* 394 U. S. 802 (1969). In *McDonald,* we held that, under the circumstances of that case, the mere allegation that Illinois had denied absentee ballots to unsentenced inmates awaiting trial in the Cook County jail did not make out a constitutional claim. I am not persuaded, however, that *McDonald* governs this case. Cf. *Goosby v. Osser,* 452 F. 2d 39 (CA3 1970), cert. granted, 408 U. S. 922 (1972). In *McDonald,* there was "nothing in the record to indicate that the Illinois statutory scheme [had] an impact on appellant's ability to exercise the fundamental right to vote." 394 U. S. at 807. We pointed out that the record was "barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.,* at 808, n. 6. Here, in contrast, it seems clear that the State has rejected alternative means by which appellants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e. g., Harper v. Virginia Board of Elections,* 383 U. S. 667, 670 (1964).

Compelling practical considerations nonetheless lead me to the conclusion that this application must be denied. Appellants waited until the last day of registration before submitting their registration statements to election officials, and they filed this application a scant four days before the election.

Moreover, neither party submitted to me the Court of Appeals opinion denying relief until 4 o'clock this afternoon, and I still do not have before me any written indication as to whether appellants have applied to the state court for a stay or as to the state court's disposition of any such application.

Even if it were possible to arrange for absentee ballots at this late date, election officials can hardly be expected to process the registration statements in the remaining time before the election. It is entirely possible that some of the appellants are disqualified from voting for other reasons or that, while qualified to vote somewhere in the State, they are not qualified to cast ballots in Monroe County. The States are, of course, entitled to a reasonable period within which to investigate the qualifications of voters. See *Dunn v. Blumstein, supra,* at 348.

Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militate against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the case in this posture, I conclude that effective relief cannot be provided at this late date. I must therefore deny the application.

APPENDIX F.

Notice of Appeal to the Supreme Court of the United States.

COURT OF APPEALS,

STATE OF NEW YORK.

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below; LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, JR., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, MCKINLEY LUNDY, JR., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALEY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, SR., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, JR., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

Appellants,

vs.

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, *et al.*, being the Monroe County Board of Elections,

Appellees.

Notice is hereby given that the above-named Appellants hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered in this action on November 3, 1972 which reversed the order of the Appellate Division of the Supreme Court, Fourth Department, entered October 27, 1972, and which affirmed the judgment of the Supreme Court, Monroe County, entered October 14, 1972, dismissing the petition.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

RUTH B. ROSENBERG
Attorney for Appellants
One Exchange Street
Rochester, New York 14603

APPENDIX G.

New York Election Law §153-a.

Absentee registration by voters who are ill or physically disabled, or whose duties, occupation or business require them to be outside the county of residence, or if a resident of the city of New York, outside said city

1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law.

* * * * *

4. Application forms for absentee registration for use pursuant to this section shall be furnished by the boards of election, upon request of the person authorized to register under this section or by any such person's spouse, parent or child; or, if residing with the applicant, by his brother, sister, uncle, aunt, nephew or niece; or by a request in writing, on behalf of the applicant.

* * * * *

Applications by applicants qualified to apply for absentee registration pursuant to the provisions of this section may be filed with the county board of elections after the close of the period of central registration and up to and including the last day of local registration, other than applications which are filed pursuant to the provisions of subdivision six and eight-a of this section. Any application sent by mail in an envelope postmarked prior to midnight of the last day for filing shall be accepted for filing when received.

5. Printed forms of applications to be made by a voter because of illness or physical disability shall contain a statement signed by the voter and a medical certificate printed together on one sheet. Such application shall contain a statement that the voter will be unable to attend before the board of inspectors of his election district on any one of the days which shall be provided for local registration because of being confined at home or in the hospital or institution, other than a mental institution because of his illness or physical disability. Such statement shall contain a provision enabling the applicant to state whether he is confined permanently because of illness or physical disability. The statement of applicant shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement shall subject the applicant to the same penalties as if he had been duly sworn and such provision shall be printed in bold type directly above the signature line on the form of statement furnished by the board of elections.

* * * * *

Such application shall be accompanied by a certificate made by a duly licensed physician or by the medical superintendent or administrative head of a hospital or institution, other than a mental institution, or by a

Christian Science practitioner, having knowledge of the facts and certifying that such applicant is unable to appear personally as required under this section because of his illness or physical disability. Such medical certificate shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing same to the same penalties as if he had been duly sworn and such provision shall be printed in bold type directly above the signature line on the medical certificate form provided by the board of elections. Such medical certificate shall be in substantially the following form, the board of elections to fill in on such form the period of central registration and the days of local registration:

* * * * *

6. Notwithstanding the provisions of subdivision two of section one hundred seventeen-a, an applicant for absentee registration who is confined permanently because of illness or physical disability and unable to appear personally before the board of central registration when said board shall be open for registration or before the board of inspectors of his election district on any of the days which shall be provided for local registration and unable to appear on the day of the next general election, as it appears from his statement and the medical certificate, shall cause to be filed with his county board of elections an application for absentee registration which shall be inclusive of an application for an absentee voter's ballot, commencing with the first day of the period of central registration and up to and including the last day of local registration. Such application shall contain an allegation that the applicant is making an application at the same time for an absentee voter's ballot.

7. The board of elections shall determine whether the illness or physical disability, as set forth in applicant's

statement is of such a nature as to render the applicant unable to appear personally at the board of elections during the period of central registration where the application was filed during such period, as provided in subdivision six of this section, or at the polling place on any of the days provided for local registration.

* * * * *

8. The application to be made by the voter who because of his duties, occupation or business will be required to be outside the county of residence, or if a resident of the city of New York, outside said city, on all of the days of local registration, shall contain an affidavit that the applicant will be unable to attend before the board of inspectors of his election district on all of the days provided by law for local registration because his duties, occupation or business require him to be outside the county or city of New York; such affidavit shall also contain the name and address of the applicant's employer, if not self employed, the nature of the duties, occupation or business requiring him to be outside the county or city of New York and also the date when he expects to return to the county or city of New York. An affidavit of the employer shall also be included in such application which shall contain a statement that the applicant for absentee registration is in his employ, the nature of such applicant's duties, occupation or business, a statement that applicant will be required to be outside the county or city of New York on all of the days provided for local registration, and a statement of the special circumstances on account of which the applicant will be so absent. Such affidavits shall be sworn to before any officer authorized to take oaths. Printed forms of such application shall contain the applicant's affidavit and also the affidavit of his employer together on one sheet.

8-a. Notwithstanding any inconsistent provision of section one hundred seventeen, an applicant for absentee registration who, because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, continuously from the commencement of the period of central registration until and including election day, and who for that reason is unable to appear personally either before the board of central registration when said board shall be open for registration or before the board of inspectors of his election district on any of the days which shall be provided for local registration or on the day of the next general election, as it appears from his affidavit and the affidavit of his employer in connection therewith, shall cause to be filed with his county board of elections an application for absentee registration which shall be inclusive of an application for an absentee voter's ballot, commencing with the first day of the period of central registration and up to and including the last day of local registration. Such application shall contain an allegation that the applicant is making an application at the same time for an absentee voter's ballot.

* * * * *

9. Upon the application of a person whose duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on all of the days of local registration, the board of elections shall determine whether the duties, occupation or business, as set forth in the affidavit, are of a nature ordinarily to require traveling beyond the boundaries of the county or city of New York, and shall determine, if they are found not to be of such a nature, whether the special circumstances, as set forth in the affidavit, are sufficient to permit absentee registration. If found insufficient the application shall be rejected and the applicant notified of such rejection with the reason therefor,

and such determination shall automatically be cause also for the rejection of the application made by the spouse, parent or child accompanying or being with such applicant.

10. Upon receipt of the application for absentee registration provided for by this section, containing the statement or affidavit, whichever the case may be, and of any other statement, affidavit, document or medical certificate required, the board of elections shall determine upon such inquiry as it deems proper whether the applicant has answered all the questions required and contained in the application and whether the applicant is legally qualified to register in the election district stated in his application as the one in which he resides, and if it finds he is not qualified shall reject the application and shall notify the applicant of such rejection and give the reason therefor.

11. Upon receipt of such application if it appears that the applicant is a new voter and that he has not furnished proof of literacy as provided in section one hundred sixty-eight, the board of elections shall thereupon notify him of the need of producing such proof and shall furnish him with the necessary forms referred to in such section for execution and filing in lieu of producing the documents referred to in such section. The board shall also notify the board of regents of the state of New York in charge of the giving of literacy tests as required by such section and an arrangement shall be made for the giving of a literacy test to such applicant and for the issuance of a certificate of literacy under the rules and regulations of such board of regents.

* * * * *

12. An affidavit or a signed statement by any officer or employee of the board of elections or any police officer, sheriff or deputy sheriff, or a special deputy attorney-

general appointed pursuant to the executive law, that he visited the premises claimed by the applicant as his residence and that he interrogated an inmate, housedweller, keeper, caretaker, owner, proprietor or landlord thereof or therein as to such applicant's residence therein or thereat, and that he was informed by one or more such persons, naming them, that they knew the persons residing upon such premises and that the applicant did not reside upon such premises, or that the applicant, if applying for absentee registration because of illness or physical disability, was not in fact so confined because of such illness or physical disability at home or in the hospital or institution, other than a mental institution, as set forth in his application; or in the case of an applicant for absentee registration who is permanently confined because of illness or physical disability, that the nature of the illness or disability of such an applicant was or is not of such seriousness as to have rendered or will render the applicant unable to appear personally at the board of elections during the period of central registration or at the polling place on any of the days provided for local registration or on the day of the next general election where the application was filed during the period of central registration as provided in subdivision six of this section, shall be sufficient authority for a determination by the board that the applicant is not entitled to absentee registration; but this provision shall not preclude the board from making such determination as the result of other inquiry.

If the board shall determine that the applicant is not entitled to absentee registration it shall notify the applicant and give him the reason for such rejection.

13. If the application for absentee registration of an applicant who is permanently confined at his home or in the hospital or other institution because of illness

or physical disability shall contain all the information required and the board of central registration is satisfied therewith, and if the board shall find that the applicant is a qualified voter of the election district containing his residence as stated in his statement, and the medical certificate, and any other document required to be filed with the application, are sufficient and such board is satisfied that the applicant is and will be so permanently confined and will not be able to leave home or the hospital or institution, not only during the period of central registration and during the period of local registration but also on the day of the next general election, the board of central registration, as soon as practicable after it shall have determined his right thereto, shall transfer all information on such application to the register of voters or on the appropriate registration records.

* * * * *

18. Notwithstanding the entry by the board of elections or the board of central registration or the inspectors of election in the registers or registration records of the required information contained on an application for absentee registration, such entry shall not preclude the board of elections from subsequently rejecting the application if it is not satisfied that the applicant is entitled to absentee registration as provided by section one hundred fifty-three-a. The board of elections, whenever it is not satisfied from an examination of an application for absentee registration that the applicant is entitled to such absentee registration, shall order an investigation through any officer or employee of the board of elections, police officer, sheriff or deputy sheriff, or a special deputy attorney-general appointed pursuant to the executive law.

* * * * *

APPENDIX H.

New York Election Law §117-a.

Application for ballots by absentee voters who may be unable to appear personally at the polling places because of illness or physical disability

1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; but the right to apply for an absentee ballot as provided in this section shall not extend to any person having the right to apply for an absentee ballot under section one hundred seventeen on account of unavoidable absence from his residence because he is an inmate of a veterans' bureau hospital.

2. A qualified voter desiring to vote at such election for the reasons specified in subdivision one of this section shall sign a statement setting forth the information as hereinafter in this section required, and mail or have delivered such statement to the board of elections not earlier than the thirtieth and not later than the seventh day before such election. Such statement shall set forth (a) his name and residence address, including street and number, if any, or town and rural delivery route, if any; (b) that he is a qualified voter of the election district in which he resides; (c) in case he voted at the preceding general election, the election district, assembly district if in the city of New York, town or city, county and state where he so voted; and (d) that he was advised by his physician, medical superintendent, administrative head of the hospital or institution, or Christian Science

practitioner, whichever is the case, that he will be unable to appear personally at the polling place of the election district in which he is a qualified voter on the day of the next general election because of his illness or physical disability and confinement either at home, or in the hospital or institution, other than a mental institution. Such statement shall be accepted for all purposes as the equivalent of an affidavit, and if false shall subject the applicant to the same penalties as if he had been duly sworn, and such provision shall be printed in bold type directly above the signature line on the form of statement furnished by the board of elections.

* * * * *

3. Such statement, if made by a voter who resides in an election district in which personal registration is required shall state that the applicant has registered, giving the date of such registration and his election district. If made by a voter who resides in an election district in which personal registration is not required, it shall state that he has nevertheless registered personally; or that he is not required to register personally and has not registered and does not expect to register personally; in such cases, if the board of elections finds that the applicant is a qualified voter of the election district and entitled to an absentee ballot under this section, the board of elections or the appropriate board of inspectors of election at the direction of the board of elections, shall cause his name to be placed on the register if it is not already thereon. Such statement, if made by a voter who resides in an election district in a county in which permanent personal registration is in effect shall state that applicant is registered.

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5. A qualified voter making an application to vote as an absentee voter as provided in this section shall at the same time submit proof of his inability to appear

personally at the polling place on the day of the next general election because of such illness or physical disability. Such proof shall be in the form of a certificate made by a duly licensed physician or by the medical superintendent or administrative head of a hospital or institution, other than a mental institution, or by a Christian Science practitioner having knowledge of the facts and certifying that such applicant is unable to appear on the day of the next general election because of the applicant's illness or physical disability. Where the applicant is unable to sign his name to the application because of illness or physical disability, the medical certificate shall certify such fact. Such certificate shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement shall subject the person signing same to the same penalties as if he had been duly sworn, and such provision shall be printed in bold type directly above the signature line on the medical certificate form furnished by the board of elections. Such medical certificate shall be in substantially the following form:

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6. Printed forms containing the application for the absentee ballot and the medical certificate, both contained on one sheet, in accordance with the requirements of this section shall be provided by the board of elections and shall be available at the board of elections and shall also be distributed in the same manner and subject to the same provisions of law as govern the distribution of applications for absentee ballots under section one hundred seventeen of this chapter.

Application forms for absentee ballots for use pursuant to this section, shall be furnished by the board of elections, upon request of the person authorized to vote under this section or by any such person's spouse, parent or child; or, if residing with the applicant, by his brother, sister, uncle, aunt, nephew or niece.